

APPENDIX

Section 320. "There is hereby levied an assessment against the capital stock of each and every bank and trust company organized or existing under the laws of this State for the purpose of creating a depositor's guaranty fund equal to five (5) per centum of its average daily deposits during its continuance in business as a banking corporation. Said assessments shall be payable one-fifth during the first year and one-twentieth during each year thereafter until the total amount of said five (5) per centum assessment shall have been fully paid: *Provided, however,* that the assessments heretofore levied and paid by banking corporations or trust companies now existing shall be deducted from and credited as a payment on said five (5) per centum assessment hereby levied. The average daily deposits of each bank during the preceding year prior to the passage and approval of this Act shall be taken as the basis for computing the amount of the first payment on the levy hereby made. One year after the passage and approval of this Act, and annually thereafter, each bank and trust company doing business under the laws of this State shall report to the Bank Commissioner the amount of its average daily deposits for the preceding year, and if such deposits are in excess of the amount upon which the first or subsequent payment of the levy hereby made is computed, each bank or trust company having such increased deposits shall immediately pay into the depositors' guaranty fund a sum sufficient to pay any deficiency on said first or subsequent payment, as shown by such increased deposits. After the five (5) per cent assessment here-

by levied shall have been fully paid up, no additional assessments shall be levied or collected against the capital stock of any such bank or trust company, except emergency assessments hereinafter provided, to pay the depositors of failed banks, and except assessments as may be necessary by reason of increased deposits to maintain such fund at five (5) per centum of the aggregate of all deposits in such banks and trust companies doing business under the laws of this State. Whenever the depositors' guaranty fund shall become impaired or be reduced below said five (5) per centum by reason of payments to depositors of failed banks, the State Banking Board shall have the power, and it shall be their duty, to levy emergency assessments against the capital stock of each bank and trust company doing business in this State sufficient to restore said impairment or reduction below five (5) per cent; but the aggregate of such emergency assessments shall not in any one calendar year exceed two (2) per centum of the average daily deposits of all such banks and trust companies. If the amount realized from such emergency assessments shall be insufficient to pay off the depositors of all failed banks having valid claims against said depositors' guaranty fund, the State Banking Board shall issue and deliver to each depositor having any such unpaid deposit, a certificate of indebtedness for the amount of his unpaid deposit, bearing six (6) per cent interest. Such certificates shall be consecutively numbered and shall be payable upon the call of the State Banking Board in like manner as State warrants are paid by the State Treasurer in the order of their issue out of the emergency levy hereafter made; and the State Banking Board shall from year to year levy emergency assessments as hereinbefore provided against the capital stock of all banking corporations and trust companies doing business in this State until all such certificates of indebted-

ness with the accrued interest thereon shall have been fully paid. As rapidly as the assets of failed banks are liquidated and realized upon by the Bank Commissioner, the same shall be applied first after the payment of the expense of liquidation to the repayment to the depositors' guaranty fund of all money paid out of said fund to the depositors of such failed bank, and shall be applied by the State Banking Board towards refunding any emergency assessment levied by reason of the failure of such liquidated bank. *Provided, further,* that seventy-five per cent of the depositors' guaranty fund shall be invested for the benefit of said fund in State warrants or such other securities as State funds are now required to be invested."

Sec. 321. "Banks and trust companies organized subsequent to the enactment of this Act shall pay into the depositors' guaranty fund three per cent of the amount of their capital stock when they open for business, which amount shall constitute a credit fund subject to adjustment on the basis of its deposits as provided for other banks and trust companies now existing at the end of one year; *provided, however,* said three per cent payment shall not be required of new banks and trust companies formed by the reorganization or consolidation of banks and trust companies that have previously complied with the terms of this Act."

Sec. 322. "Whenever any bank or trust company organized or existing under the laws of this State shall voluntarily place itself in the hands of the Bank Commissioner, or, whenever any judgment shall be rendered by a court of competent jurisdiction, adjudging and decreeing that such bank or trust company is insolvent, or whenever its rights or franchises to conduct a banking business under the laws of this State shall have been adjudged to

be forfeited, or whenever the Bank Commissioner shall become satisfied of the insolvency of any such bank or trust company, he may, after due examination of its affairs, take possession of said bank or trust company and its assets, and proceed to wind up its affairs and enforce the personal liability of the stockholders, officers and directors."

"Section 323. In the event that the Bank Commissioner shall take possession of any bank or trust company which is subject to the provisions of this act, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is insufficient to discharge its obligations to depositors, the said Banking Board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in Section two (320), the amount necessary to make up the deficiency, and the State shall have for the benefit of the depositors' guaranty fund a first lien upon the assets of said bank or trust company and all liabilities against the stockholders, officers and directors of said bank or trust company, and against all other persons, corporations, or firms. Such liabilities may be enforced by the State for the benefit of the depositors' guaranty fund."

"Section 324. The Bank Commissioner shall take possession of the books, records and assets of every description of such bank or trust company, collect debts, dues and claims belonging to it, and upon order of the district court, or judge thereof, may sell or compound all bad or doubtful debts, and on like order may sell all the real or personal property of such bank or trust company upon such terms as the court or judge thereof may direct, and may, if necessary, pay the debts of such bank or trust company, and enforce the liabilities of the

stockholders, officers and directors; *provided, however,* that bad or doubtful debts as used in this section shall not include the liability of stockholders, officers and directors."



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In the Supreme Court of the United States

OCTOBER TERM, 1918.

UNITED STATES FIDELITY AND GUARANTY
COMPANY, *Plaintiff in Error*,

v.

STATE OF OKLAHOMA *et al.*, *Defendants in
Error*.

STATEMENT AND BRIEF OF DEFEND- ANTS IN ERROR.

S. P. FREELING,
*Attorney General of the State of
Oklahoma; and*

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LEDBETTER, STUART & BELL,
Of Counsel.



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This Court is without jurisdiction to hear this case on writ of error. It should have been brought here, if at all, by certiorari.

Northern Pacific Ry. Co. v. Solum, 247 U. S. 477, 62 Law ed. 1221;

Stadleman v. Miner, 246 U. S. 544, 62 Law ed. 875;

Ireland v. Woods, 246 U. S. 323, 62 Law ed. 745;

Philadelphia & Reading Coal and Iron Company v. Gilbert, 245 U. S. 164, 62 Law ed. 221;

Bethel v. Demaret, 10 Wall, 537, 540, 19 L. ed. 1007, 1008;

French v. Taylor, 199 U. S. 274, 277, 50 L. ed. 189, 191, 26 Sup. Ct. Rep. 76.....

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The deposit of school funds made pursuant to section 7943, Compiled Laws of 1909, was a special statutory deposit surrounded by definite limitations and was secured only by the bond sued on in this case, and was not a general deposit subject to check, protected by the depositors' guaranty fund, and the decision of the Supreme Court of Oklahoma in so construing that section is not "perverse" and "absurd."

Columbia Bank and Trust Co. v. U. S. Fidelity and Guaranty Co., 33 Okla. 535, 126 Pac. 556;

Lovett v. Lankford, 47 Okla. 767, 145 Pac. 767

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The depositors' guaranty fund of the state of Oklahoma is created by levy of assessments on

state banks and by enforcement of first lien of the state on assets of insolvent banks. This fund is a public fund of the state devoted entirely to the payment of ordinary deposits in state banks subject to check. When a state bank becomes insolvent and the bank commissioner in paying the deposits of the bank uses a part of the depositors' guaranty fund, the statutes create a first lien on the assets of the bank until the depositors' guaranty fund is reimbursed. Creditors of the bank, including special statutory depositors are postponed until the depositors' guaranty fund is reimbursed by enforcing state's first lien on the assets of the insolvent bank.

The decision of the Supreme Court of Oklahoma in construing the statutes to the above effect is not "perverse" and "absurd."

Sections 320, 321, 322 and 323, Compiled Laws of Oklahoma, 1909;

State v. Cockrell, 27 Okla. 630, 112 Pac. 1000;
Lankford v. Platte Iron Works, 235 U. S. 461, 49 Law ed. 316;

Lankford v. Schroeder, 47 Okla. 1049, 147 Pac. 1049;

Columbia Bank & Trust Company v. U. S. Fidelity & Guaranty Co., 33 Okla. 535, 126 Pac. 556;

Lankford v. Engraving & Printing Co., 35 Okla. 404, 130 Pac. 278;

Capital State Bank v. Western Casualty and Guaranty Co., 49 Okla. 549, 149 Pac. 149

11-12-13-14-15-16

The decision of the Court below was not based on Act of March 6, 1913, but on the prior statutes in force at the time the bond sued on was executed. (See above authorities) 18-19-20-21

The Fourteenth Amendment to the Constitution is not violated by the construction of the

statutes by the Supreme Court of the State of Oklahoma and the construction given the statutes is reasonable.

<i>Noble State Bank v. Haskell</i> , 219 U. S. 104, and 575;	
<i>Assaria State Bank v. Dolley</i> , 219 U. S. 121;	
<i>Abilene National Bank v. Dolley</i> , 222 U. S. 1;	
<i>German Alliance Ins. Co. v. Lewis</i> , 233 U. S. 417;	
<i>A., A. & S. F. Ry. Co. v. Matthews</i> , 174 U. S. 106;	
<i>St. Louis, Iron Mt. & Southern Ry. Co. v. Paul</i> , 173 U. S. 404;	
<i>Nichol v. Ames</i> , 173 U. S. 521;	
<i>Magoun v. Savings Bank</i> , 170 U. S. 296;	
<i>C. B. & Q. Ry. Co. v. Chi.</i> , 166 U. S. 226;	
<i>Merchants Life Association v. Yoakum</i> , 98 Fed. 251	25-34

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In the Supreme Court of the United States

OCTOBER TERM, 1918.

No. 304.

UNITED STATES FIDELITY AND GUARANTY
COMPANY, *Plaintiff in Error*,

v.

STATE OF OKLAHOMA *et al.*, *Defendants in
Error*.

STATEMENT AND BRIEF OF DEFEND- ANTS IN ERROR.

(Figures in parentheses refer to pages of printed
transcript of record.)

STATEMENT.

In its statement plaintiff in error omits:

First: Fact, that after demurrers to affirmative
defenses of plaintiff in error were sustained in trial
court on September 18, 1913, (19-20), a trial on
merits was had on October 3, 1913, upon which evi-
dence was introduced, and judgment rendered for
defendants in error. (21-22).

Second: Facts of deposit of \$50,000.00 prior to September 29, 1909, of permanent school fund of State of Oklahoma by Commissioners of Land Office of State of Oklahoma in Columbia Bank and Trust Company in accordance with provisions of bond sued on, of insolvency of said Columbia Bank and Trust Company on September 29, 1909, and its being taken in possession and control by Banking Commissioner of State of Oklahoma by virtue of banking laws of said State on September 29, 1909, of said Columbia Bank and Trust Company never having resumed business and having been insolvent at all times since September 29, 1909, of insufficiency of assets of said Columbia Bank and Trust Company to pay claims of general and unsecured depositors aggregating approximately \$3,000,000.00, of assets of Columbia Bank and Trust Company amounting in full to approximately \$2,400,00.00, of approximately \$600,000.00 having to be obtained by Bank Commissioner of the State of Oklahoma from depositors' guaranty fund of State of Oklahoma, and being used by said Bank Commissioner in paying off claims of and general and unsecured depositors, which general and unsecured depositors were those depositors who had no other security for the repayment of their deposits, except the depositors' guaranty fund. (33.)

Third: Date of rendition of judgment by Supreme Court of Oklahoma herein, to-wit, October 9, 1917.

Fourth: Judgment against plaintiff in error bears only three per cent per annum interest.

Before answering contentions in brief of plaintiff in error, we respectfully call the court's attention to the question whether or not this case has been properly brought to this court.

Since judgment of Supreme Court of State of Oklahoma herein appealed from was rendered on October 9th, 1917, and basis of complaint of plaintiff in error is alleged manifest and unreasonable construction of statutes and such alleged unreasonable construction is claimed to deprive plaintiff in error of rights guaranteed to it under the Federal Constitution, and since the validity of such statutes is not questioned by plaintiff in error, this case should have been brought here by certiorari and not by writ of error.

Northern Pacific Ry. Co. v. Solum, 247 U. S. 477, 62 Law ed. 1221.

Stadteman v. Miner, 246 U. S. 544, 62 Law ed. 875.

Ireland v. Woods, 246 U. S. 323, 62 Law ed. 745.

Philadelphia & Reading Coal and Iron Company v. Gilbert, 245 U. S. 164, 62 Law ed. 221.

In the Philadelphia & Reading Coal & Iron Company case, *supra*, in which claim was made that the attempt to compel the company to respond to a suit in the state court of New York was an invasion of the company's rights under the constitution of the United States, particularly Section 1 of the Fourteenth Amendment of the Constitution at pages 165 and 166 of the 245 U. S., this court says:

“All that was drawn in question by the motion was the validity of the service and the power

of the court, consistently with the first section of the Fourteenth amendment—probably meaning the due process of law clause—to proceed upon that service to a hearing and determination of the case. It did not question the validity of any treaty or statute of, or authority exercised under, the United States. Neither did it challenge the validity of a statute of, or an authority exercised under, any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States. Challenging the power of the court to proceed to a decision of the merits did not draw in question an authority exercised under the state, for, as this court has said, the power to hear and determine cases is not the kind of authority to which the statute refers. *Bethell v. Demaret*, 10 Wall. 537, 540, 19 L. ed. 1007, 1008; *French v. Taylor*, 199 U. S. 274, 277, 50 L. ed. 189, 191, 26 Sup. Ct. Rep. 76."

The reading of the brief of plaintiff in error clearly shows that it relies, not upon invalidity of Sections 323 and 7943 of the Compiled Laws of 1909, but upon the alleged wrongful determination by the state court of the meaning and application of said two sections.

As the Act of March 6, 1913, (Sec. 9 of Chap. 22 of Session Laws, 1913, pages 31-32) was not considered but was expressly excluded from consideration by the Supreme Court of Oklahoma, its validity is in no way in question in this case.

Should we be mistaken, however, as to our contention that this court is without jurisdiction, we answer points raised in plaintiff in error's brief as follows:

BRIEF AND ARGUMENT

The brief of plaintiff in error and every argument therein contained are based upon a misconception of the nature of the deposit secured, and the obligations assumed in the bond sued on.

The defense of the surety company in this case is based on the theory that the bond sued on was given to secure "an ordinary deposit subject to check," and that the ordinary rules which apply to principal and surety govern this case. Basing the argument upon that premise, counsel say that the Supreme Court of Oklahoma rendered a "perverse" and "absurd" decision in holding that the principal in the bond is discharged and the surety is primarily and exclusively held to pay the penalty. This argument has been made by counsel for this surety company ever since this litigation began in the fall of 1909, and while the Supreme Court of Oklahoma has rejected the argument a number of times and pointed out the fact that the deposit was not an ordinary deposit, but a special statutory deposit surrounded by definite limitations, counsel still persist in declaring that the deposit is an "ordinary deposit subject to check," and still persist in the argument that the ordinary rules which measure the rights and liabilities of principal and surety should be applied; and because the Supreme Court of Oklahoma in construing the statute relating to the subject has repeatedly disagreed with counsel, they now say that the decisions of that court are so "perverse" and "absurd" that this court should disregard them.

A brief reference to the Constitution of Oklahoma and the statute which was the sole authority for deposit in question, and the decisions of the Supreme Court construing that statute will show how greatly counsel for plaintiff in error have misconceived the issues involved.

Section 32 of Article 6 of the Constitution of Oklahoma provides that the Commissioners of the Land Office shall have charge of the sale and disposition of the school lands and other public lands of the state and the funds and proceeds derived therefrom under rules and regulations prescribed by the legislature.

The first legislature, after the Constitution went into effect, passed an act providing in substance that all the permanent school funds shall be invested in first mortgages upon real estate and certain other securities therein mentioned, and that until such funds should be advantageously invested in the securities mentioned, the Commissioners of the Land Office should have authority to deposit the funds in banks or trust companies to be selected by them, and in order to safeguard the deposits of this fund, Section 7943 of the Compiled Laws of Oklahoma, 1909, which reads as follows, was enacted:

"Until such time as said funds may be safely and advantageously invested in the securities mentioned in the preceding section, said Commissioners of the Land Office shall be and they are hereby authorized and empowered to deposit said sums in such banks or trust companies as they may select, but shall in every case

take as security for such deposits the following classes of securities *and no others*: Bonds of the State of Oklahoma, bonds of the counties, school districts, cities and towns of this state, state and county warrants and approved state, county and municipal bonds of other states, bonds of the United States, first mortgages on real estate, warrants or other legal evidence of indebtedness authorized by law to be issued by municipalities in payment of paving, sewer, waterworks, electric light or other public indebtedness and for which a special tax is authorized to be levied and collected for the payment thereof, and surety company bonds, and as additional security on any deposit which said board may make, the said Commissioners of the Land Office shall have authority to accept surety companies or trust companies as sureties, but in each case said Board of Land Commissioners shall accurately investigate the value of securities offered for such deposits, *provided*, however, such surety company or trust company shall neither be in any manner interested directly or indirectly in any bank or trust company for which it becomes additional surety; nor shall any surety, bonding or trust company be accepted as additional surety that has more than one-fourth of its paid capital invested in bank stock. The said Board of Land Commissioners may whenever they deem it advisable require additional securities after a deposit is made as they deem necessary to secure the safety of the deposit."

Attention is called to the fact that this section of the statute describes the securities by which the deposits of the school fund should be secured, and in

terms excludes all other securities. That statute was enacted solely with reference to the deposit of school funds and had no reference whatever to the banking laws of the state or to the depositors' guaranty fund, or assets of insolvent banks. The deposits of this school fund thus authorized to be made were not to be dealt with as "ordinary deposits subject to check," but could only be made in the banks selected by the Commissioners of the Land Office on the securities mentioned, *and no others.*

It will hardly be contended that Section 7943 is not a valid exercise of the legislative power of the state, or that the legislature was without authority to impose restrictions on the Commissioners of the Land Office mentioned in that section in making deposits of this fund. The subject was expressly committed to the legislature by the Constitution, and the surety company and all other corporations or persons dealing with the fund must be held to have known that the statute which designated the securities on which this fund could be deposited was a valid law of the state and that the exclusion of all other securities as a means of protecting this deposit was also a valid law of the state. In fact counsel for plaintiff in error do not claim that this section is unconstitutional.

The nature of this particular deposit secured by the very bond in controversy was determined by the Supreme Court of Oklahoma in the case of *Columbia Bank and Trust Company v. United States Fidelity*

and Guaranty Company, 33 Okla. 535, 126 Pac. 566. Speaking of this deposit the Supreme Court said:

"That the money deposited in the bank by the Commissioners of the Land Office was a deposit in a broad sense is probably true; but it is clear to our minds that the Commissioners of the Land Office are not such depositors, and the funds which the law permits them to deposit in pursuance to their official duties are not such deposits as fall within the purview of Section 323, *supra*. This was a special statutory deposit, with strict legislative bounds within which the depositor is required to act. * * * It is apparent that Section 7934, *supra*, imposes many limitations upon deposit of public school funds not applicable to the ordinary deposits."

In *Lovett v. Lankford*, 47 Okla. 767, 145 Pac. 767, this view of the deposit in controversy was reaffirmed, where the court said:

"This court, in the Columbia Bank & Trust Company case, *supra*, in effect, held that the deposits of the state were not general deposits, covered and protected by the depositors' guaranty fund. So we hold in this case."

It seems to us that Section 7943 when considered to itself, and with reference to the purpose for which it was enacted, and with reference to Section 32 of Article 6 of the Constitution which expressly committed the subject of that statute to the legislature, must be held to be a perfectly salutary and reasonable law of the state, and that the Supreme Court of the state in the two cases above mentioned, *Columbia Bank and Trust Company v. United States Fidelity and Guaranty Company*, *supra*, and

Lovett v. Lankford, supra, construed that section of the statute in a perfectly sane and reasonable way in holding that the deposits of the school fund made under the provisions of that statute was a special statutory deposit, on which were imposed many limitations not applicable to ordinary deposits, and that the deposits so made were not general deposits.

With our limited vision, we can see no other interpretation that could have been given to the statute and no other designation or description that could have been given to the nature of the deposit. The surety company when it guaranteed the payment of this deposit knew that it was a special statutory deposit, authorized only by the particular statute under discussion, and also knew that the deposit was secured by "no other" securities, except this bond.

We therefore insist that the court below in holding this deposit to be a special statutory deposit, and not an "ordinary deposit subject to check," is not subject to the criticism that its decision is "perverse" and "absurd."

The Supreme Court of Oklahoma is likewise not subjected to the criticism that its decision is "perverse" and "absurd" in holding that this deposit is not protected by the depositors' guaranty fund or the assets of the insolvent bank, the Columbia Bank and Trust Company. And the same rebuke is administered to the court below because it held that the effect of Section 323 of the Oklahoma Compiled Laws of 1909 was to give to the state, for the benefit of the depositors' guaranty fund a first lien upon

the assets of the bank, until the depositors' guaranty fund was reimbursed for all sums of money advanced from that fund to pay the bank depositors. Counsel for plaintiff in error seem to have abstracted this section of the statute from the place where it belongs, as a part of the banking system of the state and have endeavored to demolish it as a part of that system.

Sections 320 and 321 of the banking laws of Oklahoma create a depositors' guaranty fund for the purpose of guaranteeing the general deposits in state banks. Section 322 describes the conditions under which the Bank Commissioner may take possession of insolvent state banks and wind up their affairs. Section 323 provides in substance that when the Bank Commissioner takes possession of an insolvent bank for the purpose of liquidating it, the depositors of the bank should be paid in full and that when the cash available or which may be made immediately available out of the assets of the bank, is insufficient to pay its depositors in full, the banking board shall draw from the depositors' guaranty fund the amount necessary to make up the deficiency in order to pay the deposits in full, and the last paragraph of Section 323 provides for the reimbursement of the depositors' guaranty fund for any amount of that fund used to pay the deposits, as follows:

“And the state shall have for the benefit of the depositors' guaranty fund a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers

or directors of said bank or trust company and against all other persons, corporations or funds. Such liability may be enforced by the state for the benefit of the depositors' guaranty fund."

Section 324 of the statute gives the Bank Commissioner additional authority in the administration of the affairs of the bank to the end that all of the assets of the bank on which the state has a first lien, may be applied to the payment of the deposits and the reimbursement of the depositors' guaranty fund.

All of these sections of the statute under the authorities hereafter cited have been held to be constitutional and appropriate to the purpose for which they were enacted, and among the provisions of the statutes which have been held to be valid and binding is the provision which gives the state a first lien on all of the assets of the bank to reimburse the depositors' guaranty fund. The fifth paragraph of the answer of the surety company which is set forth on page 16 of the transcript shows that the deposits in the Columbia Bank and Trust Company at the time the Bank Commissioner took possession aggregated the sum of \$3,000,000.00, that its assets aggregated the sum of \$2,400,000.00, and that the Bank Commissioner and Banking Board in order to complete the payment of the depositors in the bank, used \$600,000.00 of the depositors' guaranty fund.

The court below held that under the provisions of Section 323, the state had the first lien on the assets of the bank until the depositors' guaranty fund was reimbursed to the extent of \$600,000.00 of that fund

used to pay the deposits and that no part of the assets of the bank could be applied to the payment of the special statutory deposit secured by the bond of the surety company until the first lien of the state was satisfied. Counsel no longer question the validity of this statute; but they say the decision of the Supreme Court in giving effect to the statute as a first lien on the assets of a bank is so "perverse" and "absurd" that this court should disregard it and adopt a rule of its own.

Section 323 occupies an important place in the banking laws of the state. It is one of the means provided to maintain the depositors' guaranty fund. The depositors' guaranty fund was not an asset of the bank. It was one of the public funds of the state created under the taxing power. The assessments levied against state banks are a species of taxation. That fund is created by assessments against all the state banks as well as by enforcing the first lien created by Section 323 on the assets of insolvent banks in process of liquidation.

In *State v. Cockrell*, 27 Okla. 630, 112 Pac. 1000, the Oklahoma Supreme Court held:

"That the depositors' guaranty fund and the funds of a failed bank in the hands of a Bank Commissioner for the purpose of reimbursing the depositors' guaranty fund is as much a fund of the state as the common school fund is also true."

It was also held in that case that the depositors' guaranty fund was created and maintained under the taxing power of the state.

Referring to *Cockrell v. State, supra*, this court in *Lankford v. Platte Iron Works*, 235 U. S. 461, 49 Law ed., 316, said:

"In *State ex rel Taylor v. Cockrell*, 27 Okla. 630, 112 Pac. 1000, the Supreme Court of Oklahoma had occasion to define the duties of State Examiner and Inspector. It decided that the office was constituted by the Constitution of the state and was independent of the control of the Governor, and passing upon the authority of the Examiner and Inspector over the accounts of the Bank Commissioner, it decided that "the funds and assets" of an insolvent bank are "under the management of the state," and "that the depositors' guaranty fund and the funds of a failed bank in the hands of a Bank Commissioner for the purpose of reimbursing the depositors' guaranty fund is as much a fund of the state as the common school fund."

"It was further decided that the act creating the fund was sustained as an exercise of the police power for the public welfare of the people of the state, and, having been so exercised, the assessment levied by it upon deposits for the purpose of protecting the depositors of the banks is the exertion of the same power 'which levies or causes to be levied, a tax upon the property within the state for the maintenance and support of the common schools and educational institutions.' And it was said: 'The title of such depositors' guaranty fund vests in the state just as much so as the common school lands or the proceeds of the sale of the same, and the taxes levied and collected for the maintenance and support of said schools, all of which are held in trust by the state for a specific purpose. Even

if it were not a state fund, it would at least be a fund under the management of the state.'

"From the decision it appears that the law intended to give to the state, as definite a title to the depositors' guaranty fund as to the common school fund; as definite, therefore, as the title of South Carolina to the assets of the state dispensary, which was the subject of decision in *Murray v. Wilson Distilling Company*. In both cases there were ultimate beneficiaries—in the pending case, the bank depositors; in the other case, the creditors of the dispensary. And the purpose of the law—or, if you will, the command of the law in each case was or is the satisfaction of the claims of those beneficiaries. The fund, having this ultimate destination, does not take its administration from the officers of the state, or subject them to judicial control."

The portion of the depositors' guaranty fund produced by enforcing the first lien of the state upon the assets of failed bank is just as much a part of the public funds of the state as the other portion of the depositors' fund realized from assessments against banks. The lien attaches as soon as any part of the depositors' guaranty fund is used to pay the deposits, and being a first lien, it has priority over all other claims until that fund is fully reimbursed. To the extent that the depositors' guaranty fund is a public fund whether created by the levy of assessments against state banks or the enforcement of the first lien of the state against the assets of failed bank, no person other than an ordinary depositor who has placed his money in bank in due course has any interest in that fund.

Lankford v. Schroeder, 47 Okla. 1049,
147 Pac. 1049.

The construction given to Section 323 by the court below is clearly the only construction that could be given consistent with its language and purpose. There is nothing ambiguous about the language. It plainly creates a first lien on the assets of failed banks to reimburse the depositors' guaranty fund. The statute was in force when the bond was given and every provision and obligation of the bond were subject to all the provisions of the banking laws, including the provision that created a first lien on the assets of the Columbia Bank & Trust Company to reimburse the depositors' guaranty fund to the extent of \$600,000.00 of that fund used to pay the deposits. This is true to the same extent as though the provisions of section 323 were incorporated in the bond in *haec verba*, and if the provisions of that section were written into the bond the effect would be to declare that no part of the assets of the Columbia Bank and Trust Company should be used to pay the penalty in the bond until the depositors' guaranty fund should be reimbursed for any amount of that fund which might be used to pay the Columbia Bank and Trust Company's depositors.

Section 323 was in force when the bond was executed and it was executed subject to all the rights of the state in the depositors' guaranty fund.

When section 323 is considered in its relation to the cognate provisions of the statutes of Okla-

homa creating the banking system of the state, it is difficult to see how any interpretation could have been given by the court below except to hold that the deposit in question, being a special statutory deposit surrounded by definite limitations, could not be paid out of the assets of the bank until the first lien of the state was satisfied. Having shown that the two statutes so bitterly assailed by counsel for plaintiff in error, when construed in connection with the manifest intentions and purposes of the legislature in enacting them, mean exactly what the Supreme Court of Oklahoma has interpreted them to mean, and that when that meaning is given effect, these statutes accomplish legitimate and salutary purposes in the affairs of the state, and we submit that the entire argument of counsel based on their attack on these statutes falls to the ground.

The decision of the court below in construing these statutes is not "perverse" and is not "absurd," but on the contrary the decision is consistent and logical.

II.

The decision in the court below was rendered wholly without reference to the Act of March 6, 1913, which provides that no deposit in State Banks otherwise secured shall be paid out of the Depositors' Guaranty Fund, and the persistent statement by counsel in their brief that the decision in the court below is based on that statute is not justified by the facts.

In this connection we take the liberty to quote from the brief in the Supreme Court of Oklahoma prepared by the same counsel as appear in this case. After quoting section 9 of the Session Laws of 1913, which prevents the payment of secured deposits out of the depositors' guaranty fund, counsel said:

"By this is provided that the deposit is not protected by the guaranty fund, but it is not provided that the deposit is not protected by the assets of the bank, and in the event this statute cannot effect the obligation of the contract in this case * * * if these rights are taken from them by virtue of the act of 1913, it is manifest that the obligation of the contract has been impaired and that this is a violation of the Federal Constitution."

In response to this suggestion from counsel, the court below said:

"The rights of the parties to this litigation are not affected by subsequent changes in the law regulating the depositors' guaranty fund, but must be determined by the law as it existed when the deposit was made and when the Columbia Bank and Trust Company passed into the hands of the Bank Commissioner." (29-30.)

The Supreme Court of Oklahoma evidently thought it was paying no attention to the act of the legislature of March 6, 1913, passed four years after the bond involved in this case was executed, but thought it was deciding the case under the laws

existing when the contract was made. Notwithstanding this plain declaration by the Supreme Court that subsequent laws had nothing to do with the case, counsel in their brief persist in the insinuation that the subsequent statute controls the decision of the court.

In the fifth assignment of error counsel state:

"The Supreme Court of the State of Oklahoma erred in holding that sections 323 and 7943 of the Compiled Laws of 1909, construed in connection with section 9 of chapter 22 of the Session Laws of 1913, did not violate the Fourteenth Amendment of the Constitution of the United States, and section 10 of article 1 by taking the property of plaintiff in error without due process of law."

On page 39 of their brief, counsel say:

"While the opinion of the Supreme Court does not mention the act of 1913, it gives effect to that act as applied to existing contracts."

And again on page 29 of their brief, counsel say:

"The conclusion reached by the court, it seems to us, therefore, must necessarily be based upon the statute of 1913."

And again on page 51, counsel say:

"It would be remembered that the decision of the trial court in this case was on October 3, 1913, while this act was passed on March 6, 1913, so that necessarily this act must have influenced the decision of the court."

That the State Supreme Court did not base its decision on the statute of 1913, but on its interpretation of sections 323 and 7943 of the Compiled Laws of 1909 is shown by the following quotation from the opinion which is sought to be reversed herein:

"Counsel insist that previous decisions of this court have declared the law to be that deposits of the character herein involved are not entitled to payment from the depositors' guaranty fund, but that this court has not yet decided the question as to whether such deposits were entitled to share in the distribution of the assets of an insolvent bank or trust company. Section 323, Comp. Laws of 1909, makes it the duty of the bank commissioner in the event he shall take charge of a bank or trust company, to pay the depositors of the bank or trust company in full, and provides that when the cash available, or that which can be made immediately available, of said bank or trust company, is insufficient to discharge its obligations to depositors, the banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, an amount necessary to make up the deficiency, and gives the state a first lien upon the assets of said institution and all other liabilities, against the stockholders, officers and directors and against all persons, corporations or firms, which may be enforced by the state for the benefit of the depositors' guaranty fund. Construing the statute in a number of cases, the rule has been announced that moneys deposited in an institution by the commissioners of the land office under the provisions of section 7943, Comp.

Laws of 1909, were not such deposits as fell within the purview of this section of the statute. Counsel concede that such has been the uniform holding of the court, but contend that such holding is wrong, and should be reversed. The question has been examined, and the rule announced so often, that it may well be considered as the settled views of this court upon that proposition. *Columbia Bank & Trust Co. v. U. S. Fidelity & Guaranty Co.*, 33 Okla. 535, 126 Pac. 556; *Lankford v. Okla. Eng. & Ptg. Co.*, 35 Okla. 404, 130 Pac. 278; *Lovett v. Lankford*, 47 Okla. 767, 145 Pac. 767; *Lankford v. Schroeder*, 47 Okla. 1049, 147 Pac. 1049, L. R. A. 1915F, 623; *Capitol State Bank v. Western Casualty & Guaranty Co.*, 47 Okla. 549, 149 Pac. 149." (25.)

Subsequent portions of the opinion only serve to emphasize the fact that the opinion sought to be reversed was based on the interpretation which the court had previously placed on sections 323 and 7943, Compiled Laws of 1909; and in that regard the court said that in the former decision in *Columbia Bank & Trust Company v. U. S. Fidelity & Guaranty Company*, 33 Okla. 535, 126 Pac. 556, one of the questions presented for consideration was whether the deposits of the Commissioners of the Land Office was entitled to participate pro rata in the distribution of the assets of the bank, that in discussing this question the contention of the surety company was said to be that the deposit of the Commissioners of the Land Office ought to be treated as all other deposits, that the Commissioners of the Land Office ought to participate pro rata in the dis-

tribution of the assets of the bank, that after the assets were exhausted, if there be a deficit, it ought to be paid out of the guaranty fund and that until the guaranty fund was exhausted the surety should not be called upon to meet the obligation of its bond.

It is pointed out that the court in the former case declined to adopt this view, and in considering section 323, *supra*, and section 7943, Compiled Laws of 1909, held that section 323 was enacted in pursuance of the police power of the state, acting in its sovereign capacity in behalf of its people and their interest, and not in its own behalf, and that by virtue of said section it was not intended to protect such deposits as here involved by the guaranty fund, and that section 7943 specifically related to the funds of the state itself, and the broad subject embraced within its purview was the temporary deposit and protection of the permanent school fund until it could be invested in the securities prescribed by law.

It is also pointed out that this former decision determined adversely to the contention of the present plaintiff in error the question as to whether the Commissioners of the Land Office were entitled to participate in the distribution of the assets of the bank, and on this point the court said

"The primary purpose of the bank guaranty law being to guarantee the payment of general deposits, excluding deposits of the character in question, the state is given a first lien upon the assets of the bank for the protection of the guaranty fund, and the bank commis-

sioner is specifically charged with the duty of applying the cash on hand and assets which can be converted into cash to the payment of deposits intended to be secured. It would be reasoning in a circle to say that the deposit of plaintiffs was not entitled to be paid out of the guaranty fund and yet would be entitled to participate in the assets of the insolvent institution. If that be permitted the lien of the state for the benefit of the guaranty fund is subordinated to the payment of plaintiff's deposit, and thus indirectly would be accomplished that which was not the intent of the law, and the purpose of the law be defeated. In *Lankford, State Bank Comm., v. Oklahoma Eng. & Ptg. Co.*, it was said:

"The effect of this statute is to make the state a preferred creditor until any deficiency in the guaranty fund, created by the payment therefrom of the depositors of an insolvent bank, is made up. After that, any remaining assets of the bank become available for the purpose of being pro rated and distributed among the general creditors of the bank, in the manner contended for by counsel for defendant in error." (26-27.)

Having thus shown conclusively that the opinion of the court below was determined under the law existing at the time the bond in question was executed and without reference to the act of March 6, 1913, the elaborate argument of counsel for plaintiff in error beginning on page 39 of their brief and ending on page 47, becomes irrelevant and immaterial. It might be said in passing, however, that the act of March 6, 1913, was passed after the

Supreme Court had held that the special statutory deposit of the Commissioners of the Land Office was not protected by the depositors' guaranty fund or by the assets of insolvent banks, and that that act extended the rule so as to exclude all other secured deposits.

Throughout this litigation the views of the opposing parties have been wide apart. It has been the contention of the Commissioners of the Land Office that the effect of the bond executed to secure their deposits in state banks operated under the depositors' guaranty law was to guarantee the solvency of the bank, and that as custodians of the school fund deposited in state banks, the Commissioners of the Land Office could not be relegated to the depositors' guaranty fund or the assets of failed banks for the reason that that fund, whether produced by assessments or enforcement of the state's first lien on assets of failed banks, constituted one of the public funds of the state devoted exclusively to the maintenance of the state's bank system. On the other hand, it has been the contention of the surety company that the resources of the depositors' guaranty fund should be exhausted before it could be called upon to pay the deposit, which in effect was to insist that it could never be called upon to pay the deposit, in view of the exhaustless resources of the depositors' guaranty fund.

One of the reasons why it could afford to press this extreme contention, after repeated decisions against it, is that the judgment of the trial court

required it to pay only three per cent per annum interest on the amount of the deposit. (21.)

III.

The Fourteenth Amendment is not violated by the construction of the Statute by the Supreme Court of Oklahoma. Such construction is reasonable.

Noble State Bank v. Haskell, 219 U. S. 104 and 575.

Assaria State Bank v. Dolley, 219 U. S. 121.

Abilene National Bank of Abilene v. Dolley, 228 U. S. 1.

In the Noble State Bank case, 219 U. S. at page 111, this court says:

"It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518, 42 L. Ed. 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If,

then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit, as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object, and is justified in the same way."

In the Assaria State Bank Case, 219 U. S. at pages 126 and 127, this court says:

"The case of *Noble State Bank v. Haskell*, just decided (219 U. S. 104, *ante*, 112, 31 Sup. Ct. Rep. 186) cuts the root of the plaintiffs' case, except so far as the Kansas law shows certain minor differences from that of Oklahoma. The most important of these is that contribution to the fund is not absolutely required. On this ground it is said, and was thought by the circuit judge, that the law would not be justified under the police power. We cannot agree to such a limitation. If, as we have decided, the law might compel the contribution on the grounds that we have stated, it may try to bring about the same result by the creation of motives less compulsory than command and of disadvantages in holding aloof less peremptory than an immediate stop."

"We shall not go through the details of minute criticism urged by the appellants, in

most if not all of which they are in no way concerned. Perhaps the most striking of these subordinate matters is the preference of ordinary depositors over other creditors, a preference that seems to be overstated by the appellants. This, obviously, is in aid of what we have assumed to be the one of the chief objects and justifications of such laws—securing the currency of checks."

In Abilene National Bank case, 228 U. S. at pages 4 and 5, this court says:

"The specific discrimination pointed out is that, under the Kansas statutes, the national banks do not share equally with depositors in the assets of an insolvent state bank. The bill alleges that the plaintiffs necessarily have and make deposits with state banks, and that banks necessarily borrow money from other banks and rediscount paper in other banks, and that the obligation of their contracts will be impaired and they will be deprived of the property without due process of law, contrary to article 1, section 19, and the Fourteenth Amendment of the Constitution. The section of the statute specified as having this effect is section 4, which contemplates the primary application of the assets of the bank and the double liability of stockholders to depositors. It is replied that the word 'depositors' obviously was used by mistake for 'creditors,' and that the statute was amended by substituting the latter word in 1911, chap 62, section 1. But, further, the language of the bill and the argument show that the complaint refers to future transactions, not to past. There is nothing sufficient to raise a question as to deal-

ings before the law went into effect. Contracts made after the law was in force, of course, are made subject to it, and impose only such obligations and create only such property as the law permits. *Denny v. Bennett*, 128 U. S. 489, 494, 32 L. Ed. 491, 9 Sup. Ct. Rep. 134; *Cross Lake Shooting & Fishing Club v. Louisiana*, 224 U. S. 632, 638, 639, 56 L. Ed. 924, 927, 928, 32 Sup. Ct. Rep. 577.

"The greater part of the bill is taken up with objections to the scheme of the statute, in which the plaintiffs have no concern, and that have been disposed of by the former decision of this court upon the Kansas act. There is nothing in it that calls for further remark."

The bond executed by plaintiff in error was given by plaintiff in error and accepted by the state after section 323 of the Compiled Laws of 1909 had gone into effect. It signed the bond as surety for the Columbia Bank and Trust Company voluntarily and for hire.

It could have avoided any liability by abstaining from the execution of the bond, in accordance with the doctrine announced in this court in opinion denying rehearing in the Noble State Bank case at page 580 of the 217 U. S., that the Noble State Bank could avoid the payment of an assessment for the purpose of creating a depositors' guaranty fund by going out of the banking business.

We respectfully insist that the decisions of this court above cited in effect decide the very question

here involved against contention of plaintiff in error.

In *German Alliance Insurance Company v. Lewis*, 233 U. S. at pages 417 and 418, in its opinion, this court says:

"The bill attacks the statute of Kansas as discriminating against complainant because the statute excludes from its provisions farmers' mutual insurance companies, organized and doing business under the laws of the state and insuring only farm property. The charge is not discussed in the elaborate brief of counsel, nor does it seem to have been pressed in the lower court; it is, however, covered by the assignments of error.

"The provision of the statute is, 'that nothing in this act shall affect farmers' mutual insurance companies organized and doing business under the laws of this state, and insuring only farm property.' The distinction is therefore between co-operative insurance companies insuring a special kind of property and all other insurance companies. It is only with that distinction that we are now concerned. There are special provisions in the statutes of Kansas for the organization of co-operative companies, and if the statute under review discriminates between them the German Alliance Company cannot avail itself of the discrimination. A citation of cases is not necessary, nor for the general principle that a discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a legislature may

exercise. A legislative classification may rest on narrow distinctions."

In *Atchison, Topeka & Santa Fe Railroad Company v. Matthews*, 174 U. S., this court held that the statute of Kansas providing that in an action against a railroad company for damages by fire caused in the operation of the railroad, the plaintiff need only establish the fact that the fire complained of was caused by operating the railroad, and the amount of his damages, and that such proof should be *prima facie* evidence of negligence on the part of the railroad company, and that plaintiff in the event of a recovery should also be allowed a reasonable attorney's fee, was not in conflict with the Fourteenth Amendment as denying the equal protection of the laws, and was sustained as valid.

In the opinion at page 106 of 174 U. S., Mr. Justice Brewer says:

"It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Thus, when the legislature imposes on railroad corporations a double liability for stock killed by passing trains, it says in effect that if suit be brought against a railway company for stock killed by one of its trains it must enter into the courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit it must pay not only the damage which it has done, but twice that amount. If it succeeds, it recovers nothing. On the other hand, if it should sue an indi-

vidual for destruction of its livestock it could under no circumstances recover any more than the value of that stock. So that it may be said that in matter of liability, in case of litigation, it is not placed on an equality with other corporations and individuals, yet this court has unanimously said that this differentiation of liability, this inequality of rights in the courts, is of no significance upon the question of constitutionality. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

In *St. Louis, Iron Mountain & Southern Ry. Co. v. Paul*, 173 U. S. 404 to 410, this court held that the Arkansas Act of 1889 requiring railroad companies to pay their employees when discharged their unpaid wages then earned, without deduction, or that such wages should continue at the same rate until paid, not to exceed sixty days, neither denied to such companies the equal protection of the laws, nor deprived said companies of their property without due process of law.

In *Nicot v. Ames*, 173 U. S. at page 521, in the opinion, this court says:

"The question is, when a classification is made, whether there is any reasonable ground for it or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural. *Gulf, C. & S. F. Railroad Company v. Ellis*, 165 U. S. 150-155 (41: 666-668); *Magoun v. Illinois Trust & Savings*

Bank, 170 U. S. 283, 294 (4: 1037-1043). If the classification be proper and legal, then there is the requisite uniformity in that respect."

Applying this principle, it was not only proper and legal, but also sound public policy for the State of Oklahoma to provide a protection for the deposit of the permanent school fund made by the Commissioners of the Land Office other than and different from that of the depositors' guaranty fund.

In *Magoun v. Savings Bank*, 170 U. S., page 296, in the opinion of this court, Mr. Justice McKenna, upholding the constitutionality of the inheritance tax laws of Illinois, providing for different classes and different rates of taxation, says:

"There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things. Bearing these considerations in mind, we can solve the question in controversy.

"There are three main classes in the Illinois statute, the first and second being based respectively on lineal and collateral relationship to the testator or intestate, and the third being composed of strangers to his blood and distant relatives. The latter is again divided into four subclasses dependent upon the amount of the estate received. The first two classes, there-

fore depend on substantial differences, differences which may distinguish them from each other and them or either of them from the other class difference, therefore, which bear a just and proper relation to the attempted classification—the rule expressed in *Gulf, Colorado & Santa Fe R. Co. v. Ellis, supra*. And if the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied. In other words, the law operates 'equally and uniformly upon all persons in similar circumstances.'

In *C., B. & Q. Railway Co. v. Chicago*, 166 U. S. 226, this court held that a railway company is not denied the equal protection of the laws by awarding it merely nominal compensation for the laying out of a street across its road, while individual property owners are given the value of their land that is taken.

In *Merchants Life Association v. Yoakum*, 98 Federal, 251, the Circuit Court of Appeals for the Fifth Circuit held that the provisions of article 3071 of Revised Statutes of the State of Texas 1895, reading as follows:

"In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent damages on the amount of such loss, together with all reasonable attorney's fees for the protection and collection of such loss;"

did not violate the Fourteenth Amendment as to the equal protection of the laws, although said article 3071 did not make the damages and attorney's fees therein provided for recoverable from fire insurance companies or companies engaged in insurance business other than life or health.

Respectfully submitted,

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